AUG 10 197
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-19

PETER WEISS, GEORGIANNA CESTERO, RICHARD NEUHAUS, ROSE BROOKS, DAVID BORDEN, ELLEN MILLER, SEMA LEDERMAN (MOSS), ANDREW ROBINSON, PATRICIA SALTONSTALL (ROSEMOND), JAMES M. KEMPTON, JANE BUCHENHOLZ, FRANKLIN MILLER AND ELLIS BOAL,

Petitioners,

vs.

CITY OF CHICAGO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS. THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

BRIEF OF RESPONDENT CITY OF CHICAGO IN OPPOSITION.

RICHARD L. CURRY,
Corporation Counsel of the City of Chicago,
511 City Hall, Chicago, Illinois 60602,
Attorney for Respondent.

WILLIAM R. QUINLAN,
RICHARD F. FRIEDMAN,
Assistant Corporation Counsel,
Of Counsel.

INDEX.

PAGE

Authorities Cited ii

Statutes and Ordinances 1

Statement of the Case 3

Reasons for Denying the Writ 7

I. The Order Halting the March and the Later Order Dispersing the Crowd Were Not Arbitrary 7

A. Halting the March Was Justified Because There Was Reason to Believe Disorder Would Ensue if the March Continued Southward 7

B. The Order Dispersing the Crowd Was Necessary to Prevent a Violent Situation from Becoming Worse 9

II. Section 193-1(d) Is Neither Vague Nor Overbroad; on Its Face and as Construed by the Illinois Supreme Court, It Does Not Permit an Order of Dispersal Absent an Imminent Threat of Violence 12

Conclusion 14

AUTHORITIES CITED.

Cases.

Bachellar v. Maryland, 397 U. S. 564 (1970) 10

In re Bacon, 240 Cal. App. 2d 34, 49 Cal. Rptr. 322 (1966) 11

Cassidy v. Ceci, 320 F. Supp. 223 (E. D. Wis. 1971) (three-judge court) 11

Chicago v. Greene, 47 Ill. 2d 30, 264 N. E. 2d 163 (1970), cert. den. 402 U. S. 996 12

Chicago v. Fort, 46 Ill. 2d 12, 262 N. E. 2d 473 (1970) 10, 12, 13

Chicago v. Jacobs, 46 Ill. 2d 214, 263 N. E. 2d 41 (1970) 12, 13

Chicago v. Meyer, 44 Ill. 2d 1, 253 N. E. 2d 400 (1969), cert. den. 397 U. S. 1024, reh. den. 398 U. S. 915 13

Coates v. Cincinnati, 402 U. S. 611 (1971) 12

Colten v. Kentucky, ... U. S. ....., 40 L. W. 4703 (June 13, 1972) 12

Cox v. Louisiana, 379 U. S. 559 (1965) 8

Feely v. District of Columbia (D. C. Ct. App. 1966), 220 A. 2d 325, vacated on other grounds (D. C. Cir. 1967), 387 F. 2d 216 11

Grayned v. Rockford, ... U. S. ....., 40 L. W. 4881 (June 26, 1972) 13

Gregory v. Chicago, 394 U. S. 111 (1969) 9

Heard v. Rizzo, 281 F. Supp. 720 (E. D. Pa. 1968) (three-judge court), aff'd. 392 U. S. 646 11

Hoffman v. Municipal Court, 3 Cal. App. 3d 621, 83 Cal. Rptr. 747 (1970) 11

Milk Wagon Drivers v. Meadowmoor Dairies, 312 U. S. 287 (1940) 8

People v. Cipriani, 18 Cal. App. 3d 299, 95 Cal. Rptr. 722 (1971) 11

People v. Hairston, 8 Cal. App. 3d Supp. 19, 87 Cal. Rptr. 470 (1971), cert. den. 400 U. S. 952 .....8, 11

People v. Raby, 40 Ill. 2d 392, 240 N. E. 2d 595 (1968) 13

People v. Scott, 295 N. Y. S. 2d 724 (1968) 11

People v. Uptgraft, 8 Cal. App. 3rd Supp. 1, 87 Cal. Rptr. 459 (1970), cert. den. 400 U. S. 911 .....8, 11

Rollins v. Shannon, 292 F. Supp. 580 (E. D. Mo. 1968) (three-judge court), vacated on other grounds, 401 U. S. 988 11

Statutes and Ordinances.

Ill. Rev. Stat. 1967, ch. 38, par. 26-1(a)(1) 1, 13

Municipal Code of Chicago Illinois:

Sec. 193-1(a) 2, 6, 13

Sec. 193-1(d) 2, 13

Other Authorities.

65 A. L. R. 2d 1152. 11

A. L. I., Model Penal Code, Tent. Draft No. 13, 1961 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-19.

PETER WEISS, GEORGIANNA CESTERO, RICHARD NEUHAUS, ROSE BROOKS, DAVID BORDEN, ELLEN MILLER, SEMA LEDERMAN (MOSS), ANDREW ROBINSON, PATRICIA SALTONSTALL (ROSEMOND), JAMES M. KEMPTON, JANE BUCHENHOLZ, FRANKLIN MILLER AND ELLIS BOAL,

Petitioners,

vs.

CITY OF CHICAGO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS. THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

BRIEF OF RESPONDENT CITY OF CHICAGO IN OPPOSITION.

STATUTES AND ORDINANCES.

ILL. REV. STAT. 1967, ch. 38, par. 26-1:

26.1 (a) A person commits disorderly conduct when he knowingly:

(1) Does any act in such reasonable manner as to alarm or disturb another and to provoke a breach of the peace; . . .

MUNICIPAL CODE OF CHICAGO, ILLINOIS, SEC. 193-1:

193-1. A person commits disorderly conduct when he knowingly:

(a) Does any act in such unreasonable manner as to provoke, make or aid in making a breach of peace; or

. . .

(d) Fails to obey a lawful order of dispersal by a person known by him to be a peace officer under circumstances where three or more persons are committing acts of disorderly conduct in the immediate vicinity, which acts are likely to cause substantial harm or serious inconvenience, annoyance or alarm; . . .

A. L. I, MODEL PENAL CODE, Tent. Draft No. 13, 1961:

Section 2501. Disorderly Conduct; Riot.

. . .

(2) Failure of Disorderly Persons to Desist or Disperse Upon Official Order. Where [three] or more persons are participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance or alarm, a peace officer or other official engaged in executing or enforcing the law may order the participants and others in the immediate vicinity to desist or disperse. A person who refuses or knowingly fails to obey such an order commits a misdemeanor. . . .

STATEMENT OF THE CASE.

The events which led to the arrest of petitioners occurred on the final evening of the 1968 Democratic National Convention, August 29, 1968. On that day, a crowd of some 3,000 persons, including petitioners, assembled in a downtown park. The convention's final session was being held at the Amphitheatre, about five miles southwest. Speakers in the park announced that the group would march to the Amphitheatre and demonstrate there, although the apparent leader, Dick Gregory, said that he was inviting the crowd to his house for dinner in another part of town.

The National Guard had been called out earlier in the week, and in the five days preceding petitioners' march, there had been notorious violent confrontations between demonstrators and police and guardsmen. In addition, in the spring of the year (following the assassination of Martin Luther King) there had been destructive riots in Negro and Puerto Rican communities. With this background in mind and with the knowledge that Negro residential areas lay between downtown and the Amphitheatre, General Dunn, the commander of the National Guard, told Gregory that petitioners' group could proceed south only to 18th Street and Michigan Avenue, where a final decision would be made whether the march could continue. The march began down Michigan Avenue at about 7:30 P. M.

Earlier in the day, about 4:00 P. M., a group of some 2,000 had begun a march southward on approximately the same route petitioners' group would later take. That group was stopped at 16th Street, and all but about 30 persons returned to the park. This small group continued, accom-

panied by police officers, south on State Street. Along this route the marchers were heckled by Negro residents and finally, at 39th, a scene of pushing and threats occurred between the predominantly white marchers and the Negro residents. The incidents finally ended when the marchers were escorted out of the area by the police at about 6:00 P. M.

At about 8:30 P. M. the group in which petitioners marched reached 18th Street, where a National Guard line had been set up. General Dunn and Deputy Superintendent Rochford, the ranking police officer, were already present at 18th Street. There, officers who had accompanied the earlier march informed them of the 39th Street incidents. Secret Service Agent Boggs was also present at 18th Street. (He was concerned with the safety of the presidential candidate at the Amphitheatre. There, there was no place for 3,000 marchers—the street before the Amphitheatre was closed during convention sessions and the only other nearby open areas were parking lots on private property.) After a conference among these officials, it was decided it would be unsafe to let the march continue, taking into consideration the character of the neighborhood ahead, the confrontations that afternoon and the physical facilities of the Amphitheatre.

Gregory and other march leaders conferred with Rochford and Dunn at 18th Street and were informed of the decision.

Announcements were given as the march reached 18th Street and during the 45 to 75 minutes the crowd remained there. A National Guardsman standing on a jeep continuously announced over a bull horn that the marchers must proceed north or west, but could not go south. (The intersection was barricaded along a northeast-southwest line, so that only the streets to the north and west were

open.) In addition to the public announcement, individual announcements were given by guardsmen or arresting officers before and at the time of each petitioner's arrest that they "could not proceed south," that they were "free to leave," or that "the line of march was to the north or west."

Until they arrived at 18th Street, the marchers had been generally orderly, marching in formation on the sidewalk. However, disorders began occurring after arrival when the group learned they could not proceed farther south. Although the group initially halted some yards from the corner, the marchers gradually worked their way forward until they were toe to toe and face to face with the guardsmen at the barricade. In contrast to the original manner of their march, at 18th Street the crowd spread out across the intersection, covering Michigan Avenue "from building line to building line."

It was after the march had halted and before petitioners' arrests commenced that the violence began. Members of the crowd began throwing rocks and firecrackers at the guardsmen, and some of the marchers taunted the guardsmen and urged the others to disobey the command to go west. At least one marcher called upon the crowd to charge the guard line, shouting "tonight we die here." There was no evidence that the petitioners, who were within the crowd, participated in the violence.

It should be noted that on the question of the crowd's violence, most (but not all) respondent's witnesses testified they heard and saw the firecrackers, rocks, and exhortations to violence. However, most (but not all) petitioners and petitioners' witnesses testified they saw or heard none of these events prior to petitioners' arrests.

The announcements continued during the violence. It was at this time that petitioners, some individually and some in groups, ignoring the announcements to disperse, walked

southward across the National Guard line. Each was again reminded by a police officer or guardsmen of the order of dispersal and some were told they were "free to leave," but if they persisted in marching south, they would be arrested. Upon refusing to leave, petitioners were arrested.

Following the arrest of petitioners and several others, the arrests halted, but the tension escalated. When the crowd surged upon the line of guardsmen, the crowd had to be dispersed by the National Guard using tear gas.

Petitioners were charged with, and after trial to the court, convicted of failing to obey a lawful order to disperse when three or more persons were committing acts of disorderly conduct—in violation of section 193-1(d) of the Municipal Code of Chicago, Illinois.

REASONS FOR DENYING THE WRIT.

I.

THE ORDER HALTING THE MARCH AND THE LATER ORDER DISPERSING THE CROWD WERE NOT ARBITRARY.

The petitioners' first contention is not one of nationwide importance, revolving around the facts in this particular case. An examination of those facts discloses that, under the circumstances, the arrests were lawful.

The crowd received two separate orders—first, not to proceed past 18th Street, and, second, when violence began to occur in response to that order, to disperse.

A.

Halting the March Was Justified Because There Was Reason to Believe Disorder Would Ensue if the March Continued Southward.

Petitioners were not convicted of disobeying the order halting the march at 18th Street. Rather, they were convicted of failing to disperse when "three or more persons" in the crowd assembled at 18th Street "were committing acts of disorderly conduct in the immediate vicinity."

Although the initial order closing the street forms no part of the charge of which petitioners were convicted, it is worth noting that in the face of imminent danger of violence, civil authorities are justified in stopping assemblies which, in absence of the threat of violence, would be otherwise lawful.

It is no novel premise that violence and free expres-

sion are incompatible. *Cox* v. *Louisiana,* 379 U. S. 559, 573-4 (1965). When experience has shown that a course of conduct has in the immediate past led to violence, courts may enjoin, or the police may stop, a repetition of that conduct. Even such a basic right as freedom to picket may be enjoined, as it was in *Milk Wagon Drivers* v. *Meadowmoor Dairies,* 312 U. S. 287 (1940), when a continuance of picketing would surely have led to further violence.

The Illinois Supreme Court examined the testimony of the officers accompanying the 4 P. M. march (held immediately prior to petitioners' march) and that of those familiar with the neighborhood on the proposed route of march, and recognizing that violent confrontations occurred earlier in the week, concluded that the decision to halt the march at 18th Street was well supported. With the propensity for further violence being obvious, the Illinois Supreme Court's decision is fully in accord with *Meadowmoor.*

Other courts have reached the same conclusion in similar circumstances. In *People* v. *Uptgraft,* 8 Cal. App. 3rd Supp. 1, 87 Cal. Rptr. 459 (1970), cert. den. 400 U. S. 911 and *People* v. *Hairston,* 8 Cal. App. 3rd Supp. 19, 87 Cal. Rptr. 470 (1971) cert. den. 400 U. S. 952, authorities at the San Fernando Valley State College were held to have lawfully banned a non-violent student assembly. The holding was not extraordinary in the light of the school's experience with earlier gatherings, which in the preceding two months and especially the previous two days, ended in destructive riots.

Thus no substantial federal question is raised by the halting of the march in a situation where experience indicated violence was likely if the march continued.

B.

The Order Dispersing the Crowd Was Necessary to Prevent a Violent Situation from Becoming Worse.

The apprehension of violence became reality, not from confrontation in Negro neighborhoods, as the authorities halting the march feared, but from the marchers, themselves. A march that began peacefully degenerated into taunts, exhortation to violence and throwing of rocks and firecrackers when the marchers' goal of reaching the Amphitheatre was frustrated. These disorders necessitated the order of dispersal. Because they did not participate in these activities, petitioners wrongly assert that they therefore did no wrong in failing to heed the order of dispersal.

It is essentially petitioners' claim that Section 193-1(d) of the Municipal Code of Chicago, Illinois permits conviction for innocent conduct. But this conveniently assumes the very question at issue: whether there is a "right" to be present where acts likely to cause substantial harm are taking place, or, more functionally, whether any direction to disperse is valid under the Constitution.

Petitioners suggest that the controlling case in this context is *Gregory* v. *City of Chicago,* 394 U. S. 111 (1969). That case, however, is not amenable to such a reading. Mr. Chief Justice Warren described the problem there concisely and clearly:

> "The opinion of the Supreme Court of Illinois suggests that petitioners were convicted not for the manner in which they conducted their march but rather for their refusal to disperse when requested to do so by Chicago police. See 39 Ill. 2d 47, 60, 233 N. E. 2d 422, 429 (1968). However reasonable the police request may have been and however laudable the police motives, petitioners were charged and convicted for holding a demonstration, not for a refusal to obey a police officer." 394 U. S. 111, 112.

A footnote to the opinion observes that "neither the ordinance nor the charge defined disorderly conduct as the refusal to obey a police order." That, however, is precisely the definition contained in section 193-1(d). *Gregory*, then, revolved about an improper charge and had nothing to say respecting "innocent conduct."

This Court recently has offered guidance as to whether an order to disperse may be valid. In *Bachellar* v. *Maryland*, 397 U. S. 564 (1970), convictions of anti-war protestors were reversed because they may have resulted from bystander disagreement with their views on the Vietnam war. But the Court distinguished this constitutionally invalid result from others that are free from such infirmity, commenting that

> ". . . petitioners' convictions could constitutionally have rested on a finding that they sat or lay across a public sidewalk with the intent of fully blocking passage along it, or that they refused to obey police commands to stop obstructing the sidewalk in this manner and move on. See, e.g, *Cox* v. *Louisiana* (I), at 544-555; *Shuttlesworth* v. *Birmingham*, 382 U. S. 87, 90-91 (1965)" 397 U. S. at 571.

It is difficult to find a distinction of constitutional dimension between an order to move on for obstruction and an order to move on in the presence of violence. As Mr. Justice Walter V. Schaefer of the Illinois Supreme Court noted, in an opinion upholding the ordinance:

> "In order to prevent public disturbances from escalating it is often necessary for the police to order persons congregated in the immediate vicinity of a disorder to disperse. We see no constitutional infirmity in a narrowly drawn ordinance which permits the police to arrest those who fail to comply with such an order, whether they are spectators or participants in the underlying disturbance." *Chicago* v. *Fort*, 46 Ill. 2d 12, 15 (1970).

Neither the ordinance nor the judgment are unique. The Model Penal Code contains a similar provision (Section 250.1(2), Tent. Draft No. 13, 1961). California Penal Code, section 409, is remarkably similar. It states "Every person remaining present at the place of any riot, rout, or unlawful assembly, after the same has been lawfully warned to disperse . . . is guilty of a misdemeanor." The California courts have sustained this section repeatedly. *In re Bacon,* 240 Cal. App. 2d 34, 49 Cal. Rptr. 322 (1966); *Hoffman* v. *Municipal Court,* 3 Cal. App. 3rd 621, 83 Cal. Rptr. 747 (1970); *People* v. *Uptgraft, supra; People* v. *Hairston, supra; People* v. *Cipriani,* 18 Cal. App. 3rd 299, 95 Cal. Rptr. 722 (1971).

Convictions for failure to obey an order to disperse in the presence of violence have been upheld in other states. See, *e.g., Cassidy* v. *Ceci,* 320 F. Supp. 223 (E. D. Wis. 1971) (three-judge court); *Feeley* v. *District of Columbia* (D. C. Ct. App. 1966), 220 A. 2d 325, vacated on other grounds (D. C. Cir. 1967), 387 F. 2d 216; *People* v. *Scott,* 295 N. Y. S. 2d 724 (1968); *Heard* v. *Rizzo,* 281 F. Supp. 720 (E. D. Pa., 1968) (three-judge court), aff'd 392 U. S. 646; *Rollins* v. *Shannon,* 292 F. Supp. 580 (E. D. Mo. 1968) (three-judge court), vacated on other grounds 401 U. S. 988; see also cases cited at 65 A. L. R. 2d 1152.

II.

SECTION 193-1(d) IS NEITHER VAGUE NOR OVERBROAD; ON ITS FACE AND AS CONSTRUED BY THE ILLINOIS SUPREME COURT, IT DOES NOT PERMIT AN ORDER OF DISPERSAL ABSENT OF AN IMMINENT THREAT OF VIOLENCE.

In *Colten* v. *Kentucky*, ... U. S. ....., 40 L. W. 4705 (June 13, 1972), this Court upheld against an attack of vagueness and overbreadth a statute defining disorderly conduct as acts which "cause public inconvenience, annoyance or alarm," a definition not even as definite as that of section 193-1(d): "acts . . . likely to cause substantial harm, or serious inconvenience, annoyance or alarm." The *Colten* statute was upheld because of the narrowing construction the Kentucky Supreme Court had given it in the proceedings below. Similarly, in measuring the compass of 193-1(d), a court is not "relegated . . . to the words of the ordinance" *Coates* v. *Cincinnati*, 402 U. S. 611, 614 (1971), but has the benefit of the gloss given it in many prior Illinois Supreme Court cases. *Chicago* v. *Fort*, 46 Ill. 2d 12, 262 N. E. 2d 473 (1970); *Chicago* v. *Jacobs*, 46 Ill. 2d 214, 263 N. E. 2d 41 (1970); and *Chicago* v. *Greene*, 47 Ill. 2d 30, 264 N. E. 2d 163 (1970), cert. den. 402 U. S. 996.

The particular element of overbreadth asserted by petitioners is that the ordinance requires obedience to an order that may be given on the whim of a police officer. Thus, so the argument goes, the ordinance allows an order of dispersal to be given for protected, if grating, First Amendment activities.

This argument ignores the fact that, as interpreted, an order of dispersal may only be given if there is violence or an imminent threat of violence. In its first case involving section 193-1(d), the Illinois Supreme Court held that the term "disorderly conduct" appearing therein incorpo-

rates by reference the elements of disorderly conduct contained in section 193-1(a) of the Municipal Code of Chicago. *Chicago* v. *Fort*, 46 Ill. 2d 12, at 14, 262 N. E. 2d 473 at 475. The court further noted that section 193-1(a) was similar in terms to the state disorderly conduct statute (Ill. Rev. Stat. 1967, ch. 38, par. 26-1(a)). In *People* v. *Raby*, 40 Ill. 2d 392, 397, 240 N. E. 2d 595, 598 (1968), cited in *Fort*, the court unequivocally stated that, "Under no circumstances would the statute allow persons to be punished merely for peacefully expressing unpopular views."

Similarly, in the second case in which it interpreted section 193-1(d)—a case in which the defendants were engaged in First Amendment activities—the Illinois Supreme Court observed that the arrests were permissible because "[t]he situation at the moment was one dangerously close to greater disorder." *Chicago* v. *Jacobs*, 46 Ill. 2d 214, 217, 263 N. E. 2d 41, ... (1970).

In *Grayned* v. *Rockford*, ... U. S. ....., 40 L. W. 4881, 4883 (June 26, 1972), this Court recognized that the Illinois Supreme Court clearly distinguishes an arrest for disorderly conduct from an arrest for failure to disperse in the face of imminent violence:

> "[I]n *Chicago* v. *Meyer*, 44 Ill. [2d] 1, 4 (1969), [cert. den. 397 U. S. 1024, reh. den. 398 U. S. 915], and *Chicago* v. *Gregory*, 39 Ill. 2d 47 (1968), reversed on other grounds, 394 U. S. 111 (1969), the Supreme Court of Illinois construed a Chicago ordinance prohibiting, *inter alia*, a 'diversion tending to disturb the peace,' and held that it permitted conviction only where there was '*imminent threat of violence.*' (Emphasis supplied.)"

The defendant in *Meyer* was arrested when the street-corner forum he was conducting was about to erupt into a fist-fight. The record showed that "there was some

violence and a threat of greater violence." 44 Ill. 2d at 6. Meyer was charged both with being disorderly and with failure to disperse upon the order of police. The court reversed the conviction for disorderly conduct, because it held Meyer was not disorderly or violent in giving his speech. However, even absent violence on Meyer's part, the court sustained the conviction of failing to obey the order of dispersal. The arrest was permissible because the conduct of the crowd was such that it was necessary to disperse those present in order to correct a seriously deteriorating situation.

It is clear, then, that as interpreted, the ordinance does not suffer from overbreadth. It permits an order of dispersal to be given only in the presence of the threat of violence, or, as in the present case, where acts of violence are already occuring.

CONCLUSION.

For the foregoing reasons, it is respectfully suggested that the petition fails to raise a substantial federal question nor any doubt as to the conformity of the Illinois Supreme Court's decision with prior decisions of this Court or of other courts construing similar statutes. Accordingly, the petition for writ of certiorari to the Supreme Court of Illinois should be denied.

Respectfully submitted,

RICHARD L. CURRY,
Corporation Counsel of the City of Chicago,
511 City Hall, Chicago, Illinois 60602,
Attorney for Respondent.

WILLIAM R. QUINLAN,
RICHARD F. FRIEDMAN,
Assistant Corporation Counsel,
Of Counsel.

August 10, 1972.